Erda

explained below.) Finally, many businesses would oppose EPA requests for information if they knew that EPA would immediately make it available to the public; this could seriously hamper EPA programs by requiring diversion of the Agency's resources to time-consuming and expensive efforts to compel the firms to provide the information, by use of court process. EPA is especially interested in comments on this issue. (40 F.R. 98, Tuesday, May 20, 1975, p. 21990.)

As noted, endorsement of the ESECA-type provision was well intentioned. The conferees did not adopt it, however, because these potential interpretation problems might jeopardize the positive and predictable nature of the protection which was the ultimate objective of acting to give ERDA exemption (3) authority.

The provision eventually adopted by the conferees is a revision of another alternative, which utilized the more direct and simple scheme embodied in the current "the administration shall not disclose such information" clause. That revision was the subject of a meeting with Representative JOHN MOSS, Democrat, of California, who was one of the primary authors of the Freedom of Information Act. The following statement summarizes that meeting:

SUMMARY OF MEETING OF REPRESENTATIVE JOHN E. MOSS WITH REPRESENTATIVE BARRY M. GOLDWATER, JR., ON THE FREEDOM OF INFORMATION ACT, NOV. 10, 1975

1. We agreed that it is extremely important and in the national interest that ERDA have the full cooperation and participation of the private sector, particularly American industry, in the conduct of the national energy R&D effort. This cooperation and participation is essential to ensure the success of the national effort, by providing ERDA access to existing technology and access to past, present and future successes and failures in the private sector's energy R&D activities in order to most effectively manage the national effort.

2. We agreed that any lack of predictable protection of the private sector's proprietary information under the existing Freedom of Information Act exemption from mandatory disclosure for such information (5 U.S.C. 552 (b)(4)) could seriously inhibit private sector cooperation and participation with ERDA to the detriment of the national energy research and demonstration program.

3. Mr. Moss acknowledged Mr. Goldwater's conclusion, based on an independent staff legal analysis, that protection under exemption (b)(4) is neither predictable nor adequate because of recent court interpretations of the exemption.

4. Mr. Moss indicated that, as an original author of the Freedom of Information Act, it was his intent and understanding that exemption (b)(4) would authorize the withholding from disclosure under that Act of all "confidential information" protected by 18 U.S.C. 1905 in the criminal code. He further indicated that 18 U.S.C. 1905 was not intended as the authority to withhold such information under the Freedom of Information Act, but rather it was to be the test for what information was authorized to be withheld under the authority in exemption (b)(4). He expressed disappointment that recent court holdings have not correctly interpreted this connection and often have held to the contrary that 18 U.S.C. 1905 information is not necessarily protected under (b)(4), based on the adoption by the courts of various other tests for exemption (b)(4) coverage.

5. Mr. Moss indicated that exemption (b)(3), "specifically exempted from disclosure by statute" could be utilized to create a narrow statutory exemption in other statutes where Congress concluded that there was a legitimate national interest to be effectuated by withholding a class of information. In so concluding, Congress must strike a reasonable and acceptable balance between that national interest and the national interest in public access to Federal government information effectuated by the Freedom of Information Act.

6. We agreed that, in light of the apparent state of unpredictability of protection for proprietary information under exemption (b)(4) and the need for ERDA to provide such predictable protection in order to ensure the full cooperation and participation of the private sector, Congress could conclude that there was a legitimate national interest in ERDA's having the specific authority to predictably protect proprietary information. Further, Congress could strike a reasonable and acceptable balance of that national interest and the national interest in freedom of information and create a (b)(3) exemption for ERDA for that purpose.

7. Finally, we reviewed a draft of a provision to authorize such a (b)(3) exemption for ERDA. Mr. Moss did not comment on the specific language, but did indicate that in concept the approach of the provision was acceptable and in accordance with the preceding discussion and, further, that he did not object to it. Subsequently, he indicated that the specific language could be improved, but again, that he had no fundamental objection to the approach represented by the draft provision. The statutory test for the class of information, consistent with basic FOIA principles, would, of course, be subject to judicial review under current FOIA procedure.

8. Mr. Moss emphasized that the proposed statutory language provides no authority to withhold information from Congress, or any committee or subcommittee of Congress. He also stated his belief that any Member of Congress should be able to have access to such information.

9. We agree that the above summary accurately reflects the substance of our meeting.

Signed,

JOHN E. MOSS,
BARRY M. GOLDWATER, JR.

Comments on the draft language were also requested from ERDA and the Justice Department. ERDA responded as follows in a letter of November 18, 1975, also commenting on the ESECA alternative:

DEAR MR. CHAIRMAN: Section 307 of H.R. 3474, the ERDA Authorization Bill for Fiscal Year 1976, requires ERDA to establish an Energy Resources Data Bank which would contain, to some extent, private energy resources and technology information. The ability of ERDA to protect proprietary rights in this information in view of the public disclosure requirements of this section and the impact of this section on the overall ERDA program led to Dr. Seamans' letter of September 18 which requested a modification to this provision. We are now aware that a similar problem exists in the proposed revision of section 103 of S. 598, the loan guarantee program for commercial demonstration facilities, and that alternative language which would clearly provide predictable protection for trade secrets and other proprietary information has been suggested. This alternative language (see enclosure) would provide the Administrator with specific authority to withhold from public release any information received under this section upon a satisfactory showing that public release would divulge trade secrets or other proprietary information. Further, the alternative language would permit access to such information by other Federal agencies and delegates of the Administrator for the purpose of carrying out the program authorized by section 103.

This alternative language would, in my opinion, alleviate the problems identified in the September 18 letter.

From discussion with members of your Committee's staff, it now appears that another possible solution being suggested for the protection of proprietary information would be to adopt the language of section 11 of the Energy Supply and Environment Coordination Act of 1974 (P.L. 93-319). However, this would not be satisfactory in my view as it utilizes 18 U.S.C. 1905 as its test for establishing the information entitled to be withheld from public release. As noted in Dr. Seamans' September 18 letter reliance on 18 U.S.C. 1905 for such a test has led to a growing concern on the part of industry over the possible public release of their proprietary information. Further, section 11 of P.L. 93-319 provides that the confidential status of proprietary information may be lost if such information must be provided to other Federal agencies. This provision, if applicable to the synthetic fuel commercial demonstration program, would place all the proprietary information received by ERDA under this program in jeopardy since such information may from time to time be required by other agencies.

For the above reasons, ERDA strongly supports the enclosed alternative language for the protection of proprietary information, instead of a number of other suggested provisions, for both the loan guarantee program of section 103 and the data bank of section 307 of H.R. 3474. We urge the adoption of this language if the conferees retain the requirement that ERDA obtain proprietary information under these sections.

Sincerely,

for R. TENNEY JOHNSON,
*General Counsel.*

ENCLOSURE: DRAFT PROVISION ON PROTECTION OF PROPRIETARY INFORMATION FOR SENATE SECTION 103 AND HOUSE SECTION 307 OF H.R. 3474

The information obtained by the Administrator under this section shall be made available in a manner which will facilitate its dissemination to other government agencies and to the public, subject to the provisions of section 552 of title 5, United States Code and section 1905 of title 18, United States Code; except that, in the national interest in the close cooperation and participation of the private sector in the successful conduct of energy research, development, and demonstration and the resulting need to provide predictable protection for proprietary information, the Administrator shall, under such regulations as he shall issue, withhold any information obtained under this section from public release upon a showing satisfactory to the Administrator that public release of such information would divulge trade secrets or other proprietary information of any person. Any delegate of the Administrator, for the purpose of carrying out this section, and any agency, when necessary to carry out that agency's duties and responsibilities, is authorized, upon request, to have access to any such withheld information; provided that such access does not constitute authority for public release of such information. This section is not authority to withhold information from Congress or any committee of Congress upon request of the Chairman.

The Justice Department responded as follows in a letter of November 18, 1975:

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on a proposed provision of H.R. 3474, a bill "To authorize appropriations to

the Energy Research and Development Administration in accordance with Section 261 of the Atomic Energy Act of 1954, as amended, Section 305 of the Energy Reorganization Act of 1974, and Section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974."

Specifically, you desire our comments on the November 17, 1975 draft provision on protection of proprietary information. In this connection this Department has worked informally with members of the staff of the House Science and Technology's Subcommittee on Energy Research, Development, and Demonstration.

The draft provision under consideration is an attempt to avoid the legal uncertainties involved in protecting from public disclosure proprietary information by creating a statutory exemption which would be within the scope of Exemption 3 of the Freedom of Information Act (5 U.S.C. § 552(b)(3)). This exemption was recently considered by the Supreme Court in *F.A.A. v. Robertson*, — U.S. —, 95 S. Ct. 2140 (1975). In our view, the draft provision would be helpful in obviating these uncertainties. It clearly states that the Administrator of ERDA and any other agencies involved may not release such proprietary information after a showing satisfactory to the Administrator that the information is indeed proprietary in character. Although there may be occasional questions as to what constitutes "proprietary information" in specific instances, this term reflects a concept familiar in federal law.

Therefore, although the draft provision may not avoid all uncertainties regarding the availability of the information involved, it nonetheless represents a significant progress. The creation of a statutory exemption that meshes with Exemption 3 of the Freedom of Information Act (5 U.S.C. § 552(b)(3)) avoids the need for ERDA to determine the often difficult questions as to whether the proprietary information sought to be protected falls within either Exemption 4 (5 U.S.C. § 552(b)(4)) or 18 U.S.C. § 1905. As long as the information to be withheld qualifies under the terms of the proposed statutory exemption, it would be covered by Exemption 3 of the Freedom of Information Act and thus would not be subject to mandatory disclosure.

The Department of Justice defers to the Energy Research and Development Administration, the agency primarily concerned with the subject matter, as to whether as a matter of policy this provision should be enacted.

Sincerely,

MICHAEL M. UHLMANN,
*Assistant Attorney General,*
*Office of Legislative Affairs.*

In summary, I believe that the conferees have acted effectively and responsibly to strike the required balance and give ERDA full authority to provide positive and predictable protection for trade secrets and other proprietary information. That authority will insure the full cooperation and participation of American industry in ERDA's critical energy R. & D. programs. I sincerely believe that all of the conferees can take great pride in this action. Our Nation's energy future and eventual energy independence will be well served by the result.

DATA BANK DUPLICATION

The original House provision, section 307, establishing a data bank was significantly modified by the conferees. The original House language is quoted above. That language was a source of concern to me because of the many existing Federal energy data banks. I summarized my difficulties with that aspect of the section in June as follows:

Section 307 mandates a data bank of either fossil or all nonnuclear energy resources and technology, as discussed above. Under either interpretation, ERDA would be required to duplicate the existing data bank activities of many Federal agencies, particularly those in the Interior Department and the Federal Energy Administration. Then Secretary of the Interior Morton communicated his concern that the Section would result in duplication of the efforts of several agencies. Since there were no formal hearings on the need for a new data bank within ERDA, it is difficult to refute Secretary Morton's assertion, as well as those of other informed energy officials who have supported the view. In the absence of a clear need for an ERDA data bank, as supported in appropriate hearings, I cannot justify the basic concept of a data bank, regardless of scope. I urge my colleagues to support my efforts to preclude any duplication of existing capabilities, facilities or organizations.

Let me cite some figures for you on the existing data banks. Each of these was established and is being maintained in response to statutory direction to the agency to do so. The Interagency Task Force on Energy Information in its July 1974 report identified and described 46 separate agencies conducting one or more activities relating to or using energy related data. Those agencies were conducting over 257 separate programs which make direct reference to energy related data. Forty-three separate computerized data bases or data files containing some form of energy related data were identified. The task force recommended that there be a significant effort to coordinate and link the existing systems. A report on the progress of the task force is due this month.

Some of those existing systems are truly massive. For example, the Bureau of Mines has 109 people and a fiscal year 1975 budget of $2.34 million for fuels data collection and analysis. Duplicating the data bank would cost an estimated $8 to $10 million. The Federal Energy Administration has some 200 people working on energy data and the Federal Power Commission has 75 people starting up its gas and electrical power data bank at a cost of $2 million and a projected annual operating budget of $1.5 to $2 million. All of these efforts are in the fossil fuel-related information area.

To require or allow ERDA to duplicate these efforts is not only sheer folly, it is clearly irresponsible. Putting ERDA in the same business would undoubtedly result in hiring away those in the existing energy information organizations. The duplication would not only be fiscally wasteful, but it would also degrade the current capability.

Now, if there are problems with the adequacy or validity of the data, the more reasonable approach is to make those agencies do their job. ERDA should not duplicate those efforts. ERDA already is required by the Solar and Geothermal Research, Development and Demonstration Acts, Public Law 93-473 and Public Law 93-410, to establish information data banks in those two areas, where none now exist. ERDA originally projected a cost of $1 million in fiscal year 1976 to start up these data banks. ERDA now has advised that the cost will be revised upward in its June 30 plan. Clearly, expanding the requirement would result in greatly increased costs and a wholly unjustified drain on the resources required to implement the solar and geothermal plans. Duplication of other existing capabilities simply cannot be accepted. I urge your support for my amendment to preclude duplication.

Dr. Seamans, in his letter of September 18 to Chairman TEAGUE on the data bank section, stated the problem as follows:

Two distinct types of energy information—resources and technology—are contemplated for the Energy Resources Data Bank. As to energy technology information, ERDA is presently required by various provisions of the Energy Reorganization Act of 1974 and the Federal Nonnuclear Energy Research and Development Act of 1974 to collect and disseminate energy technology information to the public. We have established the ERDA Technical Information Center at Oak Ridge, Tennessee, as the central data bank for the energy information required for both ERDA use and public dissemination. We do not see the need for the establishment of an additional collection of energy technology information.

The second type of information for the Energy Resources Data Bank concerns energy resources including "proved and other reserves." The purpose of assigning to ERDA the requirement to collect and maintain such information, which is basically used for regulatory or administrative action rather than for research and development, is unclear. Further, similar data banks already exist within the Government and the new Data Bank contemplated by Section 307 would be duplicative and costly. For example, the Department of the Interior collects data on coal reserves; the Geological Survey and other agencies are required to inventory geothermal resources by the Geothermal Energy Research, Development and Demonstration Act of 1974; the National Oceanic and Atmospheric Administration, and other agencies are required to inventory solar energy resources by the Solar Energy Research, Development and Demonstration Act of 1974; and the Federal Energy Administration has collected oil and gas reserves information as required by the Energy Supply and Environment Coordination Act of 1974. While the latter Act expired on June 30, 1975, it is our understanding that its special provisions for acquiring energy resources information are being proposed for renewal. When specific energy resource information is necessary for our research, development or demonstration mission, such information is available to us from other Government agencies which have the existing capability and need for acquiring and maintaining such information. Therefore, we consider the requirement for ERDA to collect and maintain its own independent Energy Resources Data Bank as both unnecessary for our mission and duplicative of other similar extensive Federal efforts.

It appears that this problem is not getting any better with time. The interagency task force published an update of its 1974 report in November. The report, entitled "Energy Information in the Federal Government," included a new Federal energy information locator system. Probably most indicative of the magnitude of the current Federal effort in energy information is the fact that the report itself is 1,000 pages long.

Fortunately, I hope, the Senate conferees have forced adoption of a compromise version of the section which should alleviate some potential for duplication. The conferees language reads as follows:

The Administrator shall promptly establish, develop, acquire, and maintain a central source of information on all energy resources and technology *in furtherance of the Administrator's research, development, and demonstration mission* carried out directly or indirectly under this Act. When the Administrator determines that such information is

ess equipment modifications, gaseous diffusion plants, the figure "$478,100,000" and substituting therefor the figure "$510,100,000".

(b) Section 101 of Public Law 93-60, as amended, is further amended by striking from subsection (b)(1), project 74-1-g, cascade uprating program, gaseous diffusion plants, the figure "$259,600,000" and substituting therefor the figure "$270,400,000".

## TITLE III—GENERAL PROVISIONS

### PART A—PROVISIONS RELATING TO PROGRAMS OTHER THAN FOSSIL ENERGY DEVELOPMENT

SEC. 301. The Administrator is authorized to perform construction design services for any Administration construction project whenever (1) such construction project has been included in a proposed authorization bill transmitted to the Congress by the Administrator, and (2) the Administrator determines that the project is of such urgency that construction of the project should be initiated promptly upon enactment of legislation appropriating funds for its construction.

SEC. 302. Any moneys received by the Administration may be retained and used for operating expenses (except sums received from disposal of property under the Atomic Energy Community Act of 1955 and the Strategic and Critical Materials Stockpiling Act, as amended, and fees received for tests or investigations under the Act of May 16, 1910, as amended (42 U.S.C. 2301; 50 U.S.C. 98h; 30 U.S.C. 7)), notwithstanding the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484), and may remain available until expended.

SEC. 303. Transfers of sums from the "Operating expenses" appropriation may be made to other agencies of the Government for the performance of the work for which the appropriation is made, and in such cases the sums so transferred, may be merged with the appropriation to which transferred.

SEC. 304. Sections 301, 302, and 303 of this Act do not apply to fossil energy development programs of the Administration.

### PART B—PROVISIONS RELATING TO NONNUCLEAR ENERGY DEVELOPMENT

SEC. 305. REPROGRAMING AUTHORITY.—Except as provided in part C of this title—

(1) no amount appropriated pursuant to this Act may be used for any nonnuclear program in excess of the amount actually authorized for that particular program by this Act,

(2) no amount appropriated pursuant to this Act may be used for any nonnuclear program which has not been presented to, or requested of, the Congress,

unless (A) a period of thirty calendar days (not including any day in which either House of Congress is not in session because of adjournment of more than three calendar days to a day certain) has passed after the receipt by the Committee on Science and Technology of the House of Representatives and the Committee on Interior and Insular Affairs of the Senate of notice given by the Administrator containing full and complete statement of the action proposed to be taken and the facts and circumstances relied upon in support of such proposed action, or (B) each such committee before the expiration of such period has transmitted to the Administrator written notice to the effect that such committee has no objection to the proposed action: *Provided*, That the following categories may not, as a result of reprograming, be decreased by more than 10 per centum of the sums appropriated pursuant to this Act for such categories: Coal, petroleum and natural gas, oil shale, solar, geothermal, and conservation.

SEC. 306. The Administrator shall submit to the Committee on Science and Technology of the House of Representatives and the Committee on Interior and Insular Affairs of the Senate a detailed explanation of the allocation of the funds appropriated pursuant to section 101(a) and 201(a) of this Act for nonnuclear energy programs and subprograms, reflecting the relationships, consistencies, and dissimilarities between those allocations and (a) the comprehensive program definition transmitted pursuant to section 102 of the Geothermal Energy Research, Development, and Demonstration Act, (b) the comprehensive program definition transmitted pursuant to section 15 of the Solar Energy Research, Development, and Demonstration Act of 1974 (42 U.S.C. 5554), (c) the comprehensive nonnuclear energy research development, and (d) demonstrations transmitted pursuant to section 6 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5905).

SEC. 307. When so specified in an appropriation pursuant to this Act for "Operating expenses" or for "Plant and capital equipment" for nonnuclear energy may remain available until expended.

SEC. 308. The Administrator shall, by June 30, 1976, and by the end of each fiscal year thereafter, submit a report to the Committee on Science and Technology of the House of Representatives and the Committee on Interior and Insular Affairs of the Senate detailing the extent to which small business and nonprofit organizations are being funded by the nonnuclear research, development, and demonstration programs of the Administrator, and the extent to which small business involvement pursuant to section 2(d) of the Energy Reorganization Act of 1974 (42 U.S.C. 5801(d)) is being encouraged by the Administrator.

SEC. 309. The Administrator shall coordinate nonnuclear programs of the Administration with the heads of relevant Federal agencies in order to minimize unnecessary duplication of programs, projects, and research facilities.

SEC. 310. The Administrator shall, as soon as practicable and consistent with design, economic, and feasibility studies, include in an annual authorization proposal a recommendation on construction of at least one demonstration offshore wind-electric generating facility.

SEC. 311. As a part of the annual report required by section 15(a)(1) of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5914(a)(1)), the Administrator shall:

(a) detail the Solar Energy Division personnel level recommended for the current fiscal year by the Administrator and submitted to the Office of Management and Budget, and the personnel level authorized upon review by that Office; and

(b) detail progress toward completion by January 1, 1980, of the objectives of the Solar Energy Research Development, and Demonstration Act of 1974 (42 U.S.C. 5551, et seq.).

SEC. 312. The Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5901) is amended by adding at the end thereof the following new section:

"CENTRAL SOURCE OF NONNUCLEAR ENERGY INFORMATION

"SEC. 17. The Administrator shall promptly establish, develop, acquire, and maintain a central source of information on all energy resources and technology in furtherance of the Administrator's research, development, and demonstration mission carried out directly or indirectly under this Act. When the Administrator determines that such information is needed to carry out the purposes of this Act, he may acquire proprietary and other information (a) by purchase through negotiation or by donation from any person, or (b) from another Federal agency. The information maintained by the Administrator shall be made available to the public, subject to the provisions of section 552 of title 5, United States Code, and section 1905 of title 18, United States Code, and to other Government agencies in a manner that will facilitate its dissemination: *Provided*, That upon a showing satisfactory to the Administrator by any person that any information, or portion thereof, obtained under this section by the Administrator directly or indirectly from such person, would, if made public, divulge (1) trade secrets or (2) other proprietary information of such person, the Administrator shall not disclose such information and disclosure thereof shall be punishable under section 1905 of title 18, United States Code: *Provided further*, That the Administrator shall, upon request, provide such information to (A) any delegate of the Administrator for the purpose of carrying out this Act, and (B) the Attorney General, the Secretary of Agriculture, the Secretary of the Interior, the Federal Trade Commission, the Federal Energy Administration, the Environmental Protection Agency, the Federal Power Commission, the General Accounting Office, other Federal agencies, when necessary to carry out their duties and responsibilities under this and other statutes, but such agencies and agency heads shall not release such information to the public. This section is not authority to withhold information from Congress or any committee of Congress upon request of the chairman.".

SEC. 313. The Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5901) is amended by adding at the end thereof (after the new section added by section 312 of this Act) the following new section:

"ENERGY INFORMATION

"SEC. 18. The Administrator is, upon request, authorized to obtain energy information under section 11(d) of the Energy Supply and Environmental Coordination Act of 1974, as amended (15 U.S.C. 796(d)).".

### PART C—PROVISIONS RELATING TO FOSSIL ENERGY DEVELOPMENT

SEC. 314. Funds appropriated pursuant to this Act for "Operating expenses" for fossil energy purposes may be used for (1) any facilities which may be required at locations, other than installations of the Administration, for the performance of research and development contracts, and (2) grants to any organization for purchase or construction of research facilities. No such funds shall be used for the acquisition of land. Fee title to all such facilities shall be vested in the United States, unless the Administrator determines in writing that the programs of research and development authorized by this Act shall best be implemented by resting fee title in an entity other than the United States: *Provided*, That, before approving the vesting of title in such entity, the Administrator shall (A) transmit such determination, together with all pertinent data, to the Committee on Science and Technology of the House of Representatives and the Committee on Interior and Insular Affairs of the Senate, and (B) wait a period of thirty calendar days (not including any day in which either House of Congress is not in session because of adjournment of more than three calendar days to a day certain), unless prior to the expiration of such period each such committee has transmitted to the Administrator written notice to the effect that such committee has no objection to the proposed action. Each grant shall be made under such conditions as the Administrator deems necessary to insure that the United States will receive therefrom benefits adequate to justify the making of the grant. No such funds shall be used under clause (1) of the first sentence of this section for the construction of any major facility the estimated cost of which, including collateral equipment, exceeds $250,000 unless the Administrator shall (1) transmit a report on